SHAMALA SATHIYASEELAN A

v.

DR JEYAGANESH C MOGARAJAH & ANOR

FEDERAL COURT, PUTRAJAYA B
ZAKI TUN AZMI CJ
ALAUDDIN MOHD SHERIF PCA
ARIFIN ZAKARIA CJ (MALAYA)
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ZULKEFLI MAKINUDIN FCJ C
[REFERENCE NO: 06-7-2009 (W)]
12 NOVEMBER 2010

CIVIL PROCEDURE: *Contempt of court - Whether contemnor must first purge contempt before contemnor can be heard - Appellant in matrimonial proceedings taking children outside Malaysia and remaining outside Malaysia in breach of custody order and order for return of children - Appellant seeking to refer constitutional questions regarding custody of children for consideration of Federal Court - Whether court may refuse to hear reference until appellant purges her contempt* D E

This reference involved a family court matter over the custody of two children aged three years 11 months and two years five months respectively ('the children'). They were the children of the wife-appellant ('wife') and husband-respondent ('husband') born out of their civil marriage solemnized in accordance with the Hindu marriage rite on 5 November 1998. In November, 2002, the Husband converted to Islam and arranged for the conversion of the children to Islam without the knowledge and consent of the wife. The Court of Appeal pursuant to art. 128(1) of the Federal Constitution referred five constitutional questions for consideration of the Federal Court. At the hearing of the reference, counsel for the husband however raised a preliminary objection that as the wife was in contempt of court she should not be allowed to prosecute her appeals *vide* this reference. It was alleged that the wife had failed to comply with the interim court order dated 17 August 2003 ('Court Order') as well as a subsequent court order dated 6 May 2004 ('Leave Order') and had not purged her contempt. The Court Order provided that the husband should have access to the children every Saturday from 1pm and 2pm until the following day at the same time. The wife and children had however left Malaysia in F G H I

2004 and never returned. As a result the husband had not been able to have access to the children as stipulated in the Court Order. He thus applied *ex parte* under the same action and obtained the Leave Order. It was a term in the Leave Order that pending the disposal of the said action the wife was to return the children within the jurisdiction of the court in Malaysia and to surrender to the court their travel documents until further order. Neither of these two orders had been complied with. Counsel for the wife informed the court that he needed to take instruction whether the wife would be willing to return to Malaysia with the children upon the determination of the reference.

Held (allowing the preliminary objection and dismissing the application):
Per Richard Malanjum CJ (Sabah & Sarawak):

(1) In removing the children out of Malaysia and thus out of the jurisdiction of this court the wife had not only disobeyed the Court Order but had also deprived the husband of his constitutional right to the children which was a very serious matter. Before considering this reference which involved the determination of the constitutional rights of both the wife and the husband, it was only fair that the court should ensure that the parties were on equal footings in all respects. Having the wife in the present position of 'heads I win, tails you lose' was not conducive to the just determination of such important constitutional questions. It would result in the constitutional right of the husband being made illusory irrespective of who succeeded. Therefore, the wife and children must appear before the Federal Court within three (3) months failing which the reference will be deemed dismissed with costs.

Per Zaki Tun Azmi CJ:

(1) The court should not give the wife any further time to appear before the court. She had avoided the contempt proceedings taken against her by the husband. By not returning to Malaysia, she had unlawfully had custody of the children and even if the court were to examine the children now as to who would they choose to live with, most likely they will choose to live with the wife. She had therefore an unfair advantage by not complying with the court order. She was also to surrender their

travel documents to the court which she failed to do. To grant her further opportunity would encourage persons like her to commit contempt against the court with the hope that the court will give her opportunity to correct it. As such, the application was dismissed.

Per Arifin Zakaria CJ (Malaya):

(1) It would be most unjust to the respondent for the court to allow the appellant to avail herself of the judicial process, when it is clear that she had no intention to comply with the court orders. There was no need for the court to grant the appellant further time to comply with the orders of the court. Orders of the court must be respected, otherwise the integrity and respect for the judiciary will be seriously undermined. As such the reference was dismissed forthwith with costs.

Per Zulkefli Makinudin FCJ:

(1) There must be an element of certainty in the conduct of proceedings before the court. To grant the appellant further time to comply with the Orders of the court would be most untenable in the circumstances of the case.

Bahasa Malaysia *Translation Of Headnotes*

Rujukan ini melibatkan halperkara mahkamah keluarga yang menyentuhi penjagaan dua orang kanak-kanak yang masing-masing berumur 3 tahun 11 bulan dan 2 tahun 5 bulan ('anak-anak'). Mereka adalah anak-anak isteri-perayu ('isteri') dan suami-responden ('suami') yang lahir dari perkahwinan sivil mereka yang diakadkan mengikut perkahwinan Hindu pada 5 November 1998. Pada bulan November 2002, suami telah memeluk Ugama Islam dan sekaligus telah menguruskan pengIslaman anak-anak tanpa pengetahuan atau persetujuan isteri. Mahkamah Rayuan, dengan bersandarkan kepada fasal 128(1) Perlembagaan Persekutuan, telah merujuk lima persoalan perlembagaan untuk pertimbangan Mahkamah Persekutuan. Di pendengaran rujukan, peguam suami bagaimanapun telah membangkitkan bantahan awal bahawa oleh kerana isteri berada dalam keadaan menghina mahkamah maka beliau tidak seharusnya dibenarkan untuk mendakwa rayuan-rayuannya melalui rujukan ini. Ianya didakwakan bahawa isteri telah gagal mematuhi perintah interim mahkamah bertarikh 17 April 2003 ('Perintah Mahkamah')

dan begitu juga perintah berikutnya bertarikh 6 Mei 2004 ('Perintah Kebenaran'), dan masih belum mendapat kemaafan bagi perbuatan menghinanya itu. Perintah Mahkamah memperuntukkan suami diberi akses kepada anak-anak pada setiap hari Sabtu dari jam 1 petang hingga 2 petang sehinggalah ke waktu yang sama keesokan harinya. Isteri dan anak-anak bagaimanapun telah meninggalkan Malaysia pada tahun 2004 dan tidak pernah kembali. Disebabkan itu, suami tidak mendapat akses kepada anak-anak seperti yang ditetapkan di dalam Perintah Mahkamah. Beliau dengan itu memohon *ex parte* di bawah tindakan yang sama dan memperoleh Perintah Kebenaran. Adalah menjadi terma Perintah Kebenaran bahawa, sementara menunggu pelupusan tindakan tersebut, isteri hendaklah mengembalikan anak-anak kepada bidangkuasa mahkamah di Malaysia dan menyerahkan kepada mahkamah dokumen-dokumen perjalanannya sehingga perintah selanjutnya. Tidak satu pun dari kedua-dua perintah ini telah dipatuhi. Peguam isteri memberitahu mahkamah bahawa beliau perlu mengambil arahan sama ada isteri sedia untuk pulang ke Malaysia bersama-sama anak-anak sebaik rujukan diputuskan.

Diputuskan (membenarkan bantahan awal dan menolak permohonan)

Oleh Richard Malanjum HB (Sabah & Sarawak):

(1) Dengan membawa anak-anak keluar dari Malaysia dan kerana itu keluar dari bidangkuasa mahkamah ini, isteri bukan sahaja mengingkari Perintah Mahkamah tetapi telah menyangkal hak perlembagaan suami kepada anak-anak yang mana ia adalah satu perkara yang serius. Sebelum mempertimbang rujukan ini yang melibatkan hak-hak perlembagaan kedua-dua isteri dan suami, adalah adil bahawa mahkamah mempastikan bahawa kedua-dua mereka berada dalam keadaan samarata dalam semua aspek. Dengan keadaan isteri yang berada dalam kedudukan "kepala saya menang, ekor awak kalah" maka jelas keadaan adalah tidak kondusif untuk pemutusan adil hak-hak perlembagaan yang sepenting ini. Ia akan membawa kepada hak perlembagaan suami menjadi ilusori tidak kiralah siapa yang berjaya. Oleh itu, isteri dan anak-anak hendaklah hadir di Mahkamah Persekutuan dalam masa tiga (3) bulan, dan jika gagal rujukan akan dikira sebagai ditolak dengan kos.

Oleh Zaki Tun Azmi KHN:

(1) Mahkamah tidak harus memberikan isteri tambahan masa untuk hadir di mahkamah. Beliau telah mengelakkan prosiding menghina yang diambil oleh suami terhadap beliau. Dengan tidak kembali ke Malaysia, beliau mempunyai penjagaan terhadap anak-anak secara tidak sah dan jikapun mahkamah kini memutuskan untuk memeriksa anak-anak berhubung dengan siapakah mereka ingin tinggal, mereka berkemungkinan akan memilih isteri. Beliau dengan itu mempunyai manfaat tidak adil setelah tidak mematuhi perintah mahkamah. Beliau juga perlu menyerahkan dokumen perjalanannya ke mahkamah tetapi gagal berbuat demikian. Maka memberikan beliau peluang selanjutnya akan mendorong orang-orang seperti beliau untuk melakukan penghinaan terhadap mahkamah dengan harapan mahkamah akan memberikan mereka peluang untuk membetulkan keadaan. Permohonan oleh itu adalah ditolak.

Oleh Arifin Zakaria HB (Malaya):

(1) Adalah amat tidak adil kepada responden untuk mahkamah membenarkan perayu memperolehi proses kehakiman, apabila ianya jelas bahawa beliau tidak mempunyai niat untuk mematuhi perintah-perintah mahkamah. Tiada keperluan untuk mahkamah memberikan perayu masa tambahan untuk mematuhi perintah-perintah mahkamah. Perintah-perintah mahkamah wajib dihormati, jika tidak integriti dan rasa hormat terhadap badan kehakiman akan terjejas dengan serius. Rujukan dengan itu ditolak dengan kos.

Oleh Zulkefli Makinudin HMP:

(1) Harus wujud elemen kepastian dalam perjalanan prosiding mahkamah. Dalam halkeadaan yang wujud, membenarkan tambahan masa kepada perayu untuk mematuhi perintah-perintah mahkamah adalah sangat untenable.

Case(s) referred to:

A-G v. Times Newspaper [1974] AC 273 ***(refd)***

Basheshar Nath v. Commr of Income-tax, Delhi and Rajasthan AIR 1959 SC 149 ***(refd)***

Byrne v. Ireland [1972] IR 241 ***(refd)***

Degen v. United States, 517 US 820 ***(refd)***

Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo [2002] 1 CLJ 721 CA ***(refd)***
Educational Company of Ireland Ltd v. Fitzpatrick (No 2) [1961] IR 345 ***(refd)***
Hadkinson v. Hadkinson [1952] 2 All ER 567 ***(refd)***
In the Marriage of MKA and SH Fahmi [1995] 19 Fam LR 517 ***(refd)***
Leaway v. Newcastle City Council (No. 2) [2005] 220 ALR 757 ***(refd)***
Mahabir Prasad v. Mahabir Prasad [1982] 1 MLJ 189 CA ***(refd)***
Maharaj v. Attorney-General of Trinidad and Tobago (No. 2) [1979] AC 385 ***(refd)***
Meadows v. Minister for Justice Equality and Law Reform [2010] IESC ***(refd)***
Meskell v. Coras Iompair Eireann [1973] IR 121 ***(refd)***
Mohan Kumar Rayana v. Komal Mohan Rayana (Bombay Family Court Appeal No. 29 OF 2007 ***(refd)***
Ntandazeli Fose v. The Minister of Safety and Security [1997] ZACC 6 ***(refd)***
Polanski v. Conde Nast Publications Ltd [2005] 1 WLR 637 ***(refd)***
Raja v. van Hoogstraten [2004] EWCA Civ 968 ***(refd)***
Rozi Jacob v/s Jacob A Chakramakkal, AIR 1973 SC 2090 ***(refd)***
RV Srinath Prasad v. Nandamuri Jayakrishna [2001] 4 SCC 71 ***(refd)***
Schumann v. Schumann [1964] 6 FLR 422 ***(refd)***
Simpson v. Attorney-General [1994] 3 NZLR 667 ***(refd)***
Steven Mishkin Pesin v. Maria Teresa Osorio Rodriguez, 244 F3d 1250 ***(refd)***
Sumedha Nagpal v. State of Delhi [2000] 9 Supreme Court Cases 745; JT 2000 (7) SC 450 ***(refd)***
Wee Choo Keong v. MBF Holdings Bhd & Anor And Another Appeal [1993] 3 CLJ 210 SC ***(refd)***
X Limited v. Morgan-Grampian (Publishers) Ltd [1991] 1 AC 1 ***(refd)***

Legislation referred to:
Federal Constitution, arts. 8, 11, 12(4), 121(1A), 128(1), (2)

For the appellant - Dato' Cyrus Dass (Datuk Ambiga Sreenevasan, Steven Thiru, Revi Nekoo, Matthew, Ratnam & Ng See Teng with him); M/s Hakem, Arabi & Associates
For the 1st respondent - Muralee Menon; M/s Jaffar & Menon
For the 2nd respondent - Azmi Mohd Rais (Zulkifli Yong with him); M/s Zulkifli Yong Azmi & Co
For the Bar Council - Lim Chee Wee
For the Buddhist, Christians, etc Consultative Council - Shamugam
For the Association of Women Lawyers - Mina Samitan
For the All Women Action Society, Women's Aid Organisation, Women Centre for Change Penang, Sisters in Islam and Persatuan Kesedatan Komuniti Selangor - Haris Ibrahim

For the National Human Rights Society - Malik Imtiaz A
For the Sidang Injil Borneo (SIB) (Semenanjung) - Anno Xavier
For the Malayan Chinese Association (MCA) - Quek Nee Meng

[Appeal from Court of Appeal; Civil Appeal No: W-01-31-04]

Reported by Amutha Suppayah B

JUDGMENT

Zaki Tun Azmi CJ: C

[1] I have had the privilege of studying the grounds of judgment of my learned brother, the Chief Judge of Sabah and Sarawak. I thoroughly agree with his reasoning and with the authorities cited therein. I do not however agree with his order that this court should D give the wife any further time to appear before this court. She had avoided the contempt proceedings taken against her by the husband. While having done so she now seeks the court's assistance to grant her leave to raise the questions mentioned in the grounds of judgment of the learned CJSS. To allow her leave to appeal would E in effect grant her benefit without her having performed her part of the obligations for which she maybe in contempt. She had also been away since 2004, ie, for six years and has not returned to Malaysia. By doing so she had unlawfully had custody of the children and even if the court were to examine the children now as to who would F they choose to live with, most likely they will choose to live with the wife. She had therefore an unfair advantage by not complying with the court order.

[2] By now the children would be about 12 years and 9 years respectively. She was also to surrender their travel documents to the G court which she failed to do. To grant her further opportunity would encourage persons like her to commit contempt against the court with the hope that the court will give him or her opportunity to correct it. The law and an order of the court is meant to be H respected and complied with and not to be looked down or disdained.

[3] For those reasons, I would allow the preliminary objection, dismiss this application and revert the matter to the Court of Appeal to be dealt with accordingly. There is no reason to give her I anymore time. Costs will be borne by the applicant.

Arifin Zakaria CJ (Malaya):

[4] This is a reference by the Court of Appeal under art. 128(2) of the Federal Constitution wherein five constitutional questions were posed to us. Apparently, the reference was made with the consent of all parties. The appeal before the Court of Appeal arose from the decision of the High Court in a family matter. The facts of the case were set out in the judgment of my learned brother CJSS and I do not propose to restate them here.

[5] At the hearing before us, learned counsel for the first respondent objected to the reference on the ground that leave was granted by the High Court on 6 May 2004 for contempt proceedings to be commenced against the appellant for breach of the interim order dated 17 April 2003. The interim order *inter alia* gave the respondent the right of access to the children.

[6] In the order of 6 May 2004, the High Court further directed the Appellant to bring back the children within the jurisdiction of the Malaysian Court while awaiting the disposal of the case. This became necessary because the appellant had on 16 April 2004 fled the country together with the two children. And by letter dated 14 May 2004, the appellant's solicitor informed the respondent's solicitor that they have no knowledge of the whereabouts of the appellant.

It is true that up to now, the respondent had only obtained leave to commence contempt proceedings against the appellant. Therefore, strictly speaking, the appellant could not be said to be in contempt of court as yet. But, the respondent could not proceed further with the contempt proceeding as the appellant is out of the country. However, judging from her conduct, it is apparent that she has no intention of complying with the orders of the Court.

[7] In the circumstances, I am of the view that it would be most unjust to the respondent for this court to allow the appellant to avail herself of the judicial process, when it is clear that she has no intention to comply with the court orders. The court should not permit itself to be used by her for her own end or benefit. As stated by my learned brother CJSS, to do so "... would result in the constitutional right of the husband being made illusory irrespective of who succeeds. And it is the solemn duty of this court to ensure that the constitutional rights enshrined in the FC is safeguarded."

The same observation was made by Abdul Hamid bin Omar LP in *Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal* [1993] 3 CLJ 210 at p. 213, which reads as follows:

> In this regard, we are mindful of the competing public interest in a litigant having a right to be heard. Although the right to be heard is a fundamental right vested in all litigants, that right however cannot be taken as an absolute right. Where the litigant shows himself to have little or no regard to an order issued against him, then he has to an extent, forfeited his right to be heard or at least postponed that right until he has suitably purged his contempt.

[8] In this connection, I would also refer to *Hadkinson v. Hadkinson* [1952] 2 All ER 567, a decision of the English Court of Appeal, wherein the facts are quite similar to the present case. In that case, it was held *inter alia*, that where an order related to a child, the court would be adamant on its due observance, for such an order was made in the interests of the welfare of the child, and the court would not tolerate any interference with or disregard of its decisions on those matters, and least of all would permit disobedience of an order that a child should not be removed outside its jurisdiction. It was further held that the mother was not entitled to prosecute or be heard in support of her appeal until she had taken the first and essential step towards purging her contempt by returning the child to the jurisdiction. Lord Denning, in delivering judgment of the court had this to say at p. 575:

> The present case is a good example of a case where the disobedience of the party impedes the course of justice. So long as this boy remains in Australia, it is impossible for this court to enforce its order in respect of him. No good reason is shown why he should not be returned before counsel is heard on the merits of this case, so that, whatever order is made, this court will be able to enforce it. I am prepared to accept the view that in the first instance the mother acted in ignorance of the order, but nevertheless, once she came to know of it, she ought to have put the matter right by bringing the boy back. Until the boy is returned, we must decline to hear her appeal.

[9] Reverting to the present case, I am of the firm view that unless and until the two children are brought back, the court should decline to proceed with the reference. Finally, I wish to state that in coming to my decision, I have had the advantage of reading both the judgments of the learned Chief Justice (CJ) and my learned brother Chief Judge of Sabah and Sarawak (CJSS). I entirely

A agree with the analysis of the law and authorities cited by the learned CJSS in support of his judgment but for the reasons given above, with much regret, I could not agree with the order as proposed by him. As stated by the learned CJ, much time had passed since the leave order was made by the High Court and the B appellant continues to stay out of the jurisdiction. For that reason, the respondent could not commence the contempt proceeding against the appellant. In the circumstances, I do not see the need for this court to grant the appellant further time to comply with the orders of the court. Orders of the court must be respected C otherwise, the integrity and respect for the judiciary will be seriously undermined.

[10] In the result, I agree with the learned CJ that the preliminary objection by the respondent ought, in the circumstances, to be D allowed and the reference be dismissed forthwith with costs. Accordingly, the matter is to be remitted to the Court of Appeal for disposal.

Richard Malanjum CJ (Sabah & Sarawak):

E **[11]** The matter before this court is a reference submitted by the Court of Appeal ('COA') pursuant to art. 128(1) of the Federal Constitution ('FC').

[12] The five questions posed for consideration read:

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i. Whether Section 95(b) of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) is *ultra vires* Article 12(4) and Article 8 of the Federal Constitution read in their proper context?

G ii. Whether Section 95(b) of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505), as State law, is by reason of Article 75 of the Federal Constitution, inconsistent with a Federal law, namely, Section 5(1) of the Guardianship of Infants Act 1961 (as amended) and is therefore invalid?

H iii. In the context of Article 121(1A) of the Federal Constitution, where a custody order is made by the Syariah Court or the High Court, on the basis that it has jurisdiction to do so, whether there is jurisdiction for the other court to make a conflicting order?

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iv. Where there has been a conversion of the children of a civil marriage into Islam by one parent without the consent of the other parent, whether the rights of remedy under Part II of the Federal Constitution of the non-Muslim parent read with the Law Reform (Marriage and Divorce) Act 1976 is vested in the High Court?

v. Whether in the context of Articles 8, 11, 12 (4) and 121 (1A) of the Federal Constitution, the Syariah Court has exclusive jurisdiction to determine the validity of conversion of a minor into Islam once the minor has been registered by the Registrar of Muallafs (Majlis Agama Islam)?

[13] These questions were formulated by the COA with the consent of counsel for the parties during the hearing of the appeal (W-01-31-04) against the judgment of the High Court in Originating Summons No. S8-24-1727-2003. It was thus agreed that the hearing of the appeal and all other pending appeals (W-1084-03, W-02-1033, W-02-504-04 and 02-824-03) in connection with the actions between the parties involving related issues should be stayed pending the disposal of this reference.

[14] It cannot be denied that the questions posed are complex and touch on some of the most fundamental constitutional issues besetting this country today. Yet what triggered them is in essence a family court matter over the custody of two young children ages three years 11 months and two years five months respectively ('the children') at the time of the filing of the Originating Summons No. S8 -24-1727-03. They are the children of the wife-appellant ('wife') and husband-respondent ('husband') born out of their civil marriage solemnized in accordance with the Hindu marriage rites on 5 November 1998.

[15] And ordinarily, custody issue involves the consideration of the paramount interest and welfare of a child. (See: *Mahabir Prasad v. Mahabir Prasad* [1982] 1 MLJ 189; *Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo* [2002] 1 CLJ 721). It is essentially a question of fact and cannot be decided merely based upon the rights of the parties under the law. (See: *Sumedha Nagpal v. State of Delhi* [2000] 9 Supreme Court Cases 745; JT 2000 (7) SC 450). Further, it is not a matter to be approached in the way a court of law would do in commercial or contractual cases.

[16] 'In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. The litigation where the question of a custody is involved and where the parties are at loggerheads, in our opinion, such litigation cannot be dealt with like any other petition/suit or appeal in civil or commercial litigation. The courts are not expected to examine legality of the impugned order or go into a question as to whether the trial court has committed any error of law. Such litigation needs to be dealt with keeping the welfare and well-being of the child in view' per DB Bhosale, J in *Mohan Kumar Rayana v. Komal Mohan Rayana* (Bombay Family Court Appeal No. 29 OF 2007).

[17] Similar view was also expressed earlier on by the Indian Supreme Court in *Rozi Jacob v/s Jacob A Chakramakkal*, AIR 1973 SC 2090 when it said this:

> The children are not mere chattels; nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded is the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

[18] While the question of custody simpliciter itself demands a tactful approach due to its sensitive nature and sentimental attachment thereto (see: *RV Srinath Prasad v. Nandamuri Jayakrishna* [2001] 4 SCC 71), this matter before this court has taken an added dimension of enormous constitutional importance. It arises from the fact that the husband had arranged for the conversion of the children to Islam on 25 November 2002 without the knowledge and consent of the wife. The husband himself had earlier on embraced the Muslim faith on 19 November 2002. Thus, the change in the circumstances of the family members has brought into focus, *inter alia*, art. 121(1A) of the FC. And connected thereto to be considered for their constitutional implications in the dispute between the parties are arts. 8, 11, and 12(4) of the FC.

The Preliminary Objection

[19] As this court prepared to hear this reference learned counsel for the husband stood up to raise a preliminary objection. It was quickly followed by a counter objection from learned counsel for the

wife submitting that the preliminary objection should be dismissed in limine due to the absence of notice as required under the Bar Council Ethics Rules. The counter objection was overruled as being merely a technicality and would cause no prejudice to the wife.

[20] Basically the preliminary objection relates to the assertion by learned counsel for the husband that as the Wife is in contempt of court she should not be allowed to prosecute her appeals vide this reference. He cited the case of *Wee Choo Keong v. MBF Holdings Bhd & Anor And Another Appeal* [1993] 3 CLJ 210 to substantiate his contention for the application of the general principle that 'a party in contempt cannot be heard further in the same proceedings for his own benefit unless and until he has purged his contempt'. It is alleged that the wife has failed to comply with the interim court order dated 17 April 2003 ('court order') as well as the subsequent court order dated 6 May 2004 (leave order) and has not purged her contempt.

The Court Orders

[21] The court order was granted pursuant to an application made under Originating Summons No. S8-24-3586-2002. The terms are these:

i. That the husband has access to the children every Saturday from 1pm and 2pm until the following day (Sunday) at the same time;

ii. That the husband is to pick up the children from the house of the wife;

iii. That the husband is not allowed to bring the children outside the district of Alor Setar;

iv. That the husband is to pay maintenance of RM250 for the children respectively by crediting into their saving accounts; and

v. That the arrest warrant issued by the Syariah High Court Selangor under Kes Mal Bil: 10200-028-04-2003 is not to be enforced pending the disposal of the Civil Suit No. S8-24-297-2003.

[22] It is not in dispute that the wife and the children left Malaysia in 2004. To date they have not returned.

[23] As a result the husband has not been able to have access to the children as stipulated in the court order. He thus applied *ex parte* under the same action and obtained the leave order. It was also a term in the leave order that pending the disposal of the said action the wife was to return the children within the jurisdiction of the court in Malaysia and to surrender to the court their travel documents until further order. To date neither of these two orders has been complied with.

[24] Meanwhile, on 20 July 2004 the High Court heard and disposed of the Originating Summons No. S8-24-3586-2002. It ordered a joint legal custody of the children to the wife and husband 'which meant that both the parents had to discuss and agree on issues about their two infant children', for example 'choosing the method of education, choice of religion and administrating the children's property'.

[25] The court however ordered that 'the care and control which covered the day to day care of the two infant children and the responsibility for looking after them daily would be given' to the wife with the husband being allowed to visit them on alternative weekends from 1-2pm on Saturday to Sunday 1-2pm. The prohibition for the husband to take the children out of Alor Setar as earlier ordered in the court order was maintained.

The Principle In Wee Choo Keong Case And The Current Position

[26] Learned counsel for the wife submitted that *Wee Choo Keong* case *(supra)* stated the law wrongly when it said that 'there are no exceptions to the general rule' and as such it should not be followed. Learned counsel proffered that the new test is whether 'in the circumstances of an individual case the interests of justice would be best served by hearing the party' who is in contempt.

[27] In view of what was submitted I took the liberty of reading carefully the judgment of the then Supreme Court in *Wee Choo Keong* case *(supra)*.

[28] In that case the appellants (Wee and another) had appealed against the decision of the trial court to hear first the substantive motion of the respondents to commit the appellants to prison for contempt of court alleging that the appellants had breached the *ex parte* injunction obtained by the respondents earlier on.

[29] In dismissing the appeal the court said this, *inter alia*, at p. 221: A

> It has not been seriously disputed and indeed we find that it is also an established general rule of law that a party in contempt cannot be heard further in the same proceedings for his own benefit unless and until he has purged his contempt. The question which we have to determine in these appeals is the ambit of that general rule. B
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> We are unable to accept that any exceptions *per se* exist to the general rule that a party in contempt cannot be heard until he has purged his contempt. *We are in favour of the views expressed by Denning LJ in Hadkinson [1952] 2 All ER 567 that it is a matter of discretion depending on the circumstances of the case whether or not a litigant ought to be heard notwithstanding his contempt. This flexible approach to the jurisdiction is based upon a discretion to be exercised in accordance with the circumstances of the case which was accepted by the House of Lords in X Ltd & Anor v. Morgan-Grampian (Publishers) Ltd & Ors [1991] 1 AC 1 ... . The rationale for the rule is public policy*. Orders of court must be treated with respect and require strict obedience. C D E
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> ...
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> In this regard, we are mindful of the competing public interest in a litigant having a right to be heard. Although the right to be heard is a fundamental right vested in all litigants, that right however cannot be taken as an absolute right. Where the litigant shows himself to have little or no regard to an order issued against him, then he has to an extent, forfeited his right to be heard or at least postponed that right until he has suitably purged his contempt. F
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> ... In this context, we are more inclined to accept the view expressed by Young J in *Young v. Jackman* [1986] 7 NSWLR 97 where he said: 'Accordingly, it would seem from 1820 onwards that the rule that a person will not be heard when he is guilty of contempt extended as well to the case where a party was considered to be in contempt, that is, where his contempt had *prima facie* been demonstrated to the court or alternatively when he had confessed the facts which were the subject of a charge of contempt.' (emphasis added). H I

[30] Having therefore carefully considered what was said by the then Supreme Court, I do not think the court adopted, as portrayed, a rigid position 'that a person in contempt should not be heard'. It is obvious from the judgment that in coming to its decision the court was well appraised of the views expressed by the learned judges in *Hadkinson v. Hadkinson* [1952] 2 All ER 567.

[31] No doubt the court said that it could not .accept that any exceptions *per se* exist to the general rule that a party in contempt cannot be heard until he has purged his contempt.. But that was because it had already taken preference of the view expressed by Denning LJ to that of Romer LJ and Somervell LJ.

[32] The view of Denning LJ was subsequently considered and approved by the House of Lords in *X Limited v. Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1. Lord Bridge of Harwich (with whom Lord Templeman, Lord Griffiths, Lord Oliver of Aylmerton and Lord Lowry agreed) said this, at p. 46:

> I cannot help thinking that the more flexible treatment of the jurisdiction as one of discretion to be exercised in accordance with the principle stated by Denning LJ better accords with contemporary judicial attitudes to the importance of ensuring procedural justice than confining its exercise within the limits of a strict rule subject to defined exceptions. But in practice in most cases the two different approaches are likely to lead to the same conclusion, as they did in Hadkinson itself and would have done in *The Messiniaki Tolmi* [1981] 2 Lloyd.s Rep 595.

[33] In *Polanski v. Conde Nast Publications Ltd* [2005] 1 WLR 637 Lord Nicholls of Birkenhead reinforced the view when he said this at p. 642 para. 18:

> A similar approach is now adopted in cases where a party seeking to be heard by the court is in contempt of court. That fact is not of itself a bar to the contemnor being heard: see per Denning LJ in *Hadkinson v. Hadkinson* [1952] P 285, 298, approved by Lord Bridge of Harwich in *X Ltd v. Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1, 46. In *Arab Monetary Fund v. Hashim* (unreported) 21 March 1997, quoted by Potter LJ in the judgment of the Court of Appeal in *Motorola Credit Corp v. Uzan (No 2)* [2004] 1 WLR 113, 128, Lord Bingham of Cornhill CJ said the preferable approach is to ask

> whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders.

(See also: *In the Marriage of MKA and SH Fahmi* [1995] 19 Fam LR 517 a decision of the full court of the Family Court of Australia).

[34] Accordingly, I find no good reason to say that the *Wee Choo Keong* case *(supra)* is erroneous in law. The then Supreme Court preferred the approach that 'it is a matter of discretion depending on the circumstances of the case whether or not a litigant ought to be heard notwithstanding his contempt'.

[35] And it is trite law that discretion must be exercised judicially. His Honour Campbell J. in *Leaway v. Newcastle City Council (No 2)* [2005] 220 ALR 757 on the right of a contemnor to be heard, eruditely put it this way at para. 87:

> At the outset, I note that it is not suggested that the discretion that a judge might exercise in deciding not to hear a person in contempt is a completely open-ended or unguided one. If it is to be a discretion which is exercised judicially, it needs to be one which aims at achieving an objective or objectives which are able to be stated as a matter of law, or to involve a balancing of factors which can be said, as a matter of law, to be ones which are appropriate to take into account for the purpose of exercising that discretion. Only one standard has been invoked, as the objective which is sought to be advanced by sometimes declining to hear someone who is in contempt, by the judges who have favoured it being a matter of discretion whether a person in contempt should be heard. That standard is what is appropriate for the administration of justice.

[36] I am therefore of the view that the approach adopted in the *Wee Choo Keong* case *(supra)* is not entirely out of step with the modern formulation of the test by the Court of Appeal (England and Wales) in *Raja v. van Hoogstraten* [2004] EWCA Civ 968 at para. 82 per Chadwick LJ:

That an appellate court may refuse to hear a party who has been found to be in contempt and who has made no attempt to purge that contempt is not in doubt – see *Hadkinson v. Hadkinson* [1952] P 285, *Astro Exito Navegacion SA v. Southland Enterprise Co Ltd (The Messiniaki Tolmi)* [1981] 2 Lloyd's Rep 595 and *X Ltd v. Morgan Grampian (Publishers) Ltd and Others* [1991] 1 AC 1. But it is now recognised that there is no general rule that a court will not hear an application for his own benefit by a person in contempt unless until he has first purged his contempt; so that, in order to avoid the application of that rule the party in contempt must bring himself within some established exception. The approach which the court should adopt is now found in the judgment of Lord Bingham of Cornhill, Chief Justice, in *Arab Monetary Fund v. Hashim And Others* (unreported, 21 March 1997). After referring to the speeches of Lord Bridge of Harwich and Lord Oliver of Aylmerton in *X Ltd v. Morgan Grampian*, Lord Bingham said this:

> From those speeches it is, I think, clear that it is wrong to take as a starting point the proposition that the court will not hear a party in contempt and then ask if the instant case falls within an exception to that general rule. *It is preferable to ask whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders*. (emphasis added).

[37] In other words the modern formulation of the test is a refinement of the discretionary test first propounded by Denning LJ in *Hadkinson v Hadkinson (supra)*.

[38] Thus, in exercising the discretion in relation to the preliminary objection in this reference it should be taken into account the facts and the circumstances prevailing between the wife and husband as well as that of the children while keeping in mind how best the interest of justice can be served.

Safeguarding Constitutional Rights

[39] The core issue between the parties is over the custody of the children. And as stated above, ordinarily, in coming to any decision on the issue, what needs to be considered is the paramount interests and welfare of the children which may even prevail over the bar on a contemnor to be heard. (See: *Schumann v. Schumann* [1964] 6 FLR 422).

[40] However, as noted earlier, this reference has an added fundamental constitutional issue. A

[41] Premised on the undisputed facts it is the wife who is seeking, *inter alia*, for the interpretation of the phrase 'parent or guardian' as found in art. 12(4) of the FC which reads: B

> (4) For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.

[42] In the event that this court rules in her favour she will thus have the equal right as that of the husband over the religion of the children. In short she is seeking an order to establish her constitutional right which for now the husband says that he has the sole rights in view of the word 'parent or guardian' in singular used in the constitutional provision. C D

[43] Assuming therefore for a moment that the contention of the wife is sustained by reading the provision (art. 12(4) of the FC) as giving both the wife and husband equal right over the religion of the children, I am of the view that in removing the children out of Malaysia and thus out of the jurisdiction of this court the wife has not only disobeyed the court order but has also deprived the husband of his constitutional right to the children which in my view is a very serious matter. E

[44] The wife is before this court with a complaint that she has been deprived of her constitutional right to the children. But it is also a fact that the husband has been deprived of access to the children since 2004 despite the court order and hence his constitutional right. I would therefore think that he is equally entitled to complain that his constitutional right has been infringed. F G

[45] Both parties are entitled to safeguard his or her constitutional rights to the children. And bearing in mind that constitutional rights are sacrosanct it is expected that they must be religiously safeguarded. Thus, it was said and which I agree that if 'an established right in law exists a citizen has the right to assert it and it is the duty of the courts to aid and assist him in the assertion of his right. The court will therefore assist and uphold a citizen's constitutional rights. Obedience to the law is required of every citizen, and it follows that if one citizen has a right under the H I

Constitution there exists a correlative duty on the part of the other citizens to respect that right and not to interfere with it.' (See: *Educational Company of Ireland Ltd v. Fitzpatrick (No 2)* [1961] IR 345 per Budd J at p. 368).

[46] The view of Budd J was subsequently supported by Walsh J in *Meskell v. Coras Iompair Eireann* [1973] IR 121 at p. 133 when he said that 'if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right.' (See also: *Byrne v. Ireland* [1972] IR 241). And it 'is the task of the courts to ensure that where rights are wrongfully breached that remedies are effective'. (See: *Meadows v. Minister for Justice Equality and Law Reform* [2010] IESC; *Basheshar Nath v. Commr of Income-tax, Delhi and Rajasthan* AIR 1959 SC 149; *Ntandazeli Fose v. The Minister of Safety and Security* [1997] ZACC 6; *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2)* [1979] AC 385 (PC); *Simpson v. Attorney-General* (*Baigent*'s case) [1994] 3 NZLR 667 (CA)). I find no reason why the foregoing legal principles cannot be adopted into our local jurisprudence.

[47] Indeed constitutional rights are so cherished that even a conduct which is calculated to 'inhibit suitors generally from availing themselves of their constitutional right to have their legal rights and obligations ascertained and enforced in courts of law, by holding up any suitor to public obloquy for doing so or by exposing him to public and prejudicial discussion of the merits or the facts of his case before they have been determined by the court or the action has been otherwise disposed of in due course of law' has been considered as in contempt of court. (See: *A-G v. Times Newspaper* [1974] AC 273 at p. 310, per Lord Diplock).

[48] Thus, before considering this reference which would involve the determination of the constitutional rights of both the wife and the husband, it is only fair that this court should ensure that the parties are on equal footings in all respects. Having the wife in the present position of 'heads I win, tails you lose' is not conducive to the just determination of such important constitutional questions. It would result in the constitutional right of the husband being made illusory irrespective of who succeeds. And it should be the solemn duty of this court to ensure that constitutional rights enshrined in the FC are safeguarded. Further, it is settled law that a litigant should be allowed to enjoy the fruit of his or her litigation.

[49] Incidentally, in determining the respective constitutional rights of the husband and the wife over the children, the question of who is at fault or who initiated the problem should not arise. The paramount interest of the children must be given priority.

[50] Therefore, with the foregoing factors in the forefront on my mind and taking into account the question of how best the interest of justice is served in the exercise of discretion and in fairness, the parties should be heard notwithstanding there is an issue of contempt raised. Unfortunately the wife was absent during the hearing. And I am conscious that any decision made by this court should not be in vain.

The Ruling

[51] But I also noted that learned counsel for the wife informed this court during the hearing that he needed to take instruction whether the wife would be willing to return to Malaysia with the children upon the determination of this reference. Maybe learned counsel for the wife should be allowed to seek for the necessary instruction as I do not think any serious prejudice would be caused. Further, the husband had only obtained leave for contempt against the wife and did not proceed with it. Thus, strictly speaking, an order is yet to be obtained that in law the wife is in contempt although it is not in dispute that due to her absence in this country the wife is yet to comply with the court order and the leave order.

[52] Accordingly in the final analysis and notwithstanding any instruction that may be obtained by learned counsel for the wife, I am of the view that since there is no undue serious prejudice, I am therefore inclined to rule that the interest of justice is best served by making an order that the wife and the children are to appear before this court within three months from today failing which this reference will be deemed dismissed with costs. Upon dismissal the Court of Appeal may then proceed to deal with the matter before it accordingly.

Other Contentions Considered

[53] It was emphasized before us that the alleged contempt committed by the wife relates to the orders of the High Court which are not under appeal. Hence it was submitted that the general principle that a party in contempt cannot be heard, should not

apply. Such submission is premised on the basis that the general principle should be confined to contempt in the same suit, proceedings or cause as that in which the application was made. (See: *In the Marriage of MKA and SH Fahmi (supra)*).

[54] With respect, although the court order and the leave order are not directly being appealed against, they are however interim orders of the High Court made under the Originating Summons No. S8-24-3586-2002. The final judgment of the High Court disposing of the said action is under appeal together with the other judgments in respect of the other related actions between the parties. These appeals are interrelated and collectively upon which the questions posed in this reference were formulated by the COA. It is therefore quite far-fetched to say that since there are no appeals against the court order and the leave order the alleged contempt cannot be said to be in the same suit, proceedings or cause.

[55] Thus, with the alleged contempt being in the same suit, proceedings or cause as this reference and if the general principle as discussed above is strictly applied and without considering the modern formulation of the test, this reference could be dismissed *in limine* but for my ruling above.

[56] Mr Malik Imtiaz, learned counsel for the National Human Rights Society submitted that this court should proceed to answer the questions referred and let the final determination of the appeals to the COA guided by the answers given to the questions posed in this reference.

[57] At first blush the suggestion seems reasonable. However, the answers, if given, to the questions posed would entail, in practical effect, their mere formal application to the critical issues raised in those appeals. In other words, the contentious issues raised in the appeals are therefore addressed while circumventing the general principle invoked in the preliminary objection. That in my view may not be in the best interest of justice.

The Fugitive Disentitlement Doctrine

[58] Just as a matter of interest and not an indication that the doctrine may be applied in our courts any time soon, a person in contempt before a court in the United States of America in criminal or civil case may have the fugitive disentitlement doctrine applied against him. It is an equitable doctrine with a goal of 'not so much

to punish the fugitive, but rather to eliminate the possibility of "heads I win, tails you lose" litigation, wherein the fugitive could enjoy the results of a victory while ignoring (and by his or her conduct, effectively negating) the consequences of defeat'. Further, it provides the court the discretion to preclude a fugitive from calling upon the resources of the court to determine his claim or appeal. (See: *Degen v. United States*, 517 US 820, 823 (1996); *Steven Mishkin Pesin v. Maria Teresa Osorio Rodriguez*, 244 F3d 1250 (11th Cir 2001)].

[59] The doctrine however was not endorsed by House of Lords. Although their Lordships differed in the outcome of the appeal before them (3 - 2) in *Polanski v. Conde Nast Publications Ltd (supra)* they were on common ground in dealing with the issue of access to justice for fugitives from justice. This is what Lord Nicholls of Birkenhead said at p. 644 paras. 30 and 31:

> 30. I understand the intuitive dislike of relieving a fugitive of a disadvantage which until recently was inherent in his self-created status. Until recently the fugitive had to make up his mind whether (a) to surrender his fugitive status and give his oral evidence in court or (b) to maintain his flight from justice and suffer whatever disadvantages this might have in civil proceedings to which he was a party as claimant or defendant.
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> 31. I understand that. But overall the matter which weighs most with me is this. Despite his fugitive status, a fugitive from justice is entitled to invoke the assistance of the court and its procedures in protection of his civil rights. He can bring or defend proceedings even though he is, and remains, a fugitive. If the administration of justice is not brought into disrepute by a fugitive's ability to have recourse to the court to protect his civil rights even though he is and remains a fugitive, it is difficult to see why the administration of justice should be regarded as brought into disrepute by permitting the fugitive to have recourse to one of the court's current procedures which will enable him in a particular case to pursue his proceedings while remaining a fugitive.

[60] Similarly, Lord Carswell at p. 658 para. 90 said this:

> 90. I may state at once that I would not support the application of the principle in such a way that a person in the position of the claimant would become in effect an outlaw. Mr. Pannick for the defendants, quite rightly in my opinion, disclaimed

A reliance on any such use of the principle. I also respectfully agree with the view expressed by Lord Nicholls of Birkenhead in para. 19 of his opinion that it is not appropriate to have resort to the doctrine of *ex turpi causa non oritur actio*. Nor is it necessary to import into our legal system the full rigour of the fugitive offender doctrine accepted in courts in the United States.

B

Conclusion

[61] In conclusion I repeat my ruling in para. 42 above.

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Zulkefli Makinudin FCJ:

[62] I have had the benefit of reading the judgments of the learned Chief Justice, Chief Judge of Malaya and Chief Judge of Sabah and Sarawak and I agree with the conclusion reached by both the learned Chief Justice and the Chief Judge of Malaya. I am of the view there must be an element of certainty in the conduct of proceedings before the court. To grant the appellant further time to comply with the orders of the court would be most untenable in the circumstances of this case.

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